

OUTDOOR ADVENTURES, S.W.

IBLA 80-644

Decided September 17, 1980

Appeal from decision of the Albuquerque, New Mexico, District Office, Bureau of Land Management, rejecting special recreation permit application NM 018-80-16.

Affirmed.

1. Special Use Permits: Generally

BLM's decision to award the one special recreation permit to use the Rio Grande River in New Mexico for commercial river trips which is available to first-time applicants by placing all closely qualified first-time applications into a drawing is an equitable way to award the permit and will be affirmed.

2. Special Use Permits: Generally

BLM's decision to restrict to 12 the number of special recreation permits to use the Rio Grande River in New Mexico for commercial river trips will be affirmed where the record shows that congestion on the river justifies such a restriction.

APPEARANCES: Jon Runnestrand, Vice President, Outdoor Adventures, S.W.; John H. Harrington, Esq., Office of the Field Solicitor, Department of the Interior, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

In January 1980, Outdoor Adventures, S.W. (appellant), 1/ filed an application for a special recreation permit with the Bureau of Land Management's Area Office in Taos, New Mexico. This application was for a permit to use the Rio Grande River and adjacent lands in New Mexico for commercial rafting and hiking trips.

On February 29, 1980, the Area Office advised appellant that its application had been evaluated and determined to be eligible for a drawing, that its "application [had] been placed on a waiting list," and that it would be notified if "additional commercial positions develop." On March 5, 1980, appellant filed a letter of protest, challenging BLM's use of a drawing to select permittees and asserting that BLM had erred by not recognizing that appellant was more qualified to receive a permit than the applicants chosen by drawing.

On March 17, 1980, BLM wrote to appellant to explain that it had evaluated all applications for adequacy, and, "after qualified historical use permittees were selected, all remaining qualified applicants were placed in a lottery, [2/] to fill the remaining use permits [3/] in as impartial and fair a manner as possible." BLM noted that "as commercial slots become available due to attrition or revision of the present interim management plan, they will be filled by applicants in the order they appear on the waiting list."

On April 7, 1980, appellant further protested this procedure in a letter to the Area Office and indicated that it wished to appeal. On April 11, 1980, the Taos Area Manager referred the matter to the Albuquerque District Manager, BLM. On April 17, 1980, the District Manager wrote a letter decision denying this protest, from which decision this appeal followed.

1/ Appellant refers to itself variously as Outdoor Adventures, S.W., and simply Outdoor Adventures. It is not clear whether these are two distinct entities or whether Outdoor Adventures, S.W. is simply a part of Outdoor Adventures. The latter would seem to be the case, as the application refers to the experience of "Outdoor Adventures" in California, Idaho, Nevada, Colorado, and British Columbia.

2/ BLM, the Field Solicitor, and appellant all refer to the procedure in question as a "lottery." We prefer the word "drawing," a judicially-approved appellation, as more properly descriptive of the process. See 18 U.S.C. §§ 1301, 1302 (1976).

3/ Actually, only one permit remained to be filled by the drawing (see below), but, at the time of this communication, BLM contemplated the possibility that other permits might become available if permittee relinquished them. Such permits would then have been filled according to the priority determined by the drawing.

The record shows that the Taos Area Office, BLM, has been developing a plan to manage commercial recreational use of the Rio Grande River since 1979 and, late in 1979, issued an Interim Management Plan governing such use during the 1980 season. On November 30, 1979, the Area Office had a public meeting, which appellant's representative attended, to apprise prospective commercial users of the details of this plan, under which only 12 commercial permits were to be issued in 1980. Public commentary on this plan was invited by BLM in the time following the meeting.

According to the record, 19 applications were received in 1980 for these 12 available commercial use permits. In order to decide who should get these permits, BLM applied the following criteria, awarding up to 5 points or up to 10 points per criterion, depending on the strength of the particular application:

1. Historical Use: primarily the amount of use during the 1979 season on the Rio Grande Wild and Scenic River [up to 10 points].
2. The record of use including safety, compliance and payment of fees [5 points].
3. Applicants [sic] proposed service to the public such as length of trip, cost to participants, educational aspects, etc. [up to 5 points].
4. [Financial a]bility of applicant to provide proposed services [up to 5 points].

Thus, an application could be rated up to a total of 25 points. However, as 15 of these points required a history of use in 1979 (criteria 1 and 2), an applicant with no historical use, such as appellant, could receive no more than 10 points.

BLM automatically granted permits to applicants with 20 points or more, that is, to previous permittees who also scored well on other criteria. There were 12 such applicants, enough to account for all of the permits available in 1980. However, one "20-point" applicant, Santa Fe Mountain Center, apparently did not receive a permit, for reasons which are not clear from the record. Thus, there was one permit available.

The seven remaining applications all fell from 10 to 18 points. BLM placed these applications into a drawing to determine the order of priority for this 12th permit or for any others which might become available. The first-drawn applicant was given the 12th permit. Appellant was drawn fifth.

[1] Appellant's main objection is to BLM's use of a drawing to award the permit in lieu of basing its decision on the merit and ability of the applicant. Appellant points out that BLM had never publicly stated that it would use a drawing.

BLM's use of a drawing was proper. Use of a drawing to choose one from among many closely qualified applicants to receive an interest in public lands is well established and sanctioned in oil and gas leasing (43 CFR 3112.2; Thor-Westcliffe Development, Inc. v. Udall, 314 F.2d 257, 259 (D.C. Cir. 1963), cert. denied, 373 U.S. 951 (1963)) and small tract grants (43 CFR 2233.1-3 (1966)). Accordingly, we do not hesitate to approve use of a drawing here.

We note that, even if we agreed with appellant that the drawing was improper and that merit alone should have determined the successful applicant, it would be no better off, as there were two applicants with more competitive points and none with fewer points than appellant had. Thus, if anything, the drawing actually improved appellant's chances of success.

We reject appellant's suggestion that the use of the drawing was improper because BLM gave no advance public notice that it would be used. BLM probably did not anticipate that the number of applications would exceed available permits. When this situation developed, it reacted to it reasonably by establishing a fair method of allocating the one permit slot available to first-time applicants. Its failure to have anticipated this development does not vitiate the correctness of its procedure to handle it.

[2] Appellant also argues that BLM's decision to limit the number of permits to 12 in 1980 was arbitrary and capricious and that BLM should instead have implemented an alternate system to allow all timely applicants to compete in an unregulated market. Appellant does not suggest any specific alternate plan which would have accomplished this goal. Moreover, its objections are somewhat untimely, as it had actual knowledge of the decision to limit the number of permits to 12 since the public meeting in November 1979, but apparently did not challenge this decision during the period following this meeting when commentary was invited on BLM's 1980 plan.

The record shows that BLM based its decision to regulate commercial use of the Rio Grande on data assembled in 1979 from a study of use of the river. This data showed that there was congestion at the launch area and at scouting points along the river. Accordingly, BLM concluded that it would be necessary to restrict commercial use of the river to alleviate this congestion. Congestion along the river clearly increases the chances of environmental damage and accidents endangering human life. Accordingly, we hold that BLM's decision to restrict the number of permits issued is not arbitrary or capricious, but rather is based on facts assembled from study of use of the river and is a sound effort to protect the environment of the river and to prevent accidents by alleviating congestion. Cf. Wilderness Public Rights Fund v. Kleppe, 608 F.2d 1250 (9th Cir. 1979).

Appellant alleges that congestion at the launch area has been eliminated by provisions to supply transportation service there. However, even if this were shown to be true, congestion from unlimited commercial use of the river would still be a problem at scouting points along the river and on the river itself. Thus, appellant has not successfully shown that the basis of BLM's decision was erroneous.

Appellant argues that it was prejudicial for BLM to grant commercial licenses to outfitters based outside of New Mexico, implying that its employees "live and work here in New Mexico," and suggesting that BLM should issue permits only to outfitters based in New Mexico. The record shows that "Outdoor Adventures, S.W." is located in Placitas, New Mexico. However, the application was filed on behalf of and relied on the experience of "Outdoor Adventure," which is not based in New Mexico, but, instead, has operated in California, Idaho, Nevada, Colorado, and British Columbia. No experience in New Mexico is indicated. Thus, were we to adopt appellant's suggestion and bar outfitters from outside of New Mexico, appellant itself apparently would not receive a permit.

Finally, appellant suggests that BLM's decision to regulate commercial use while only monitoring private use in 1980 is inequitable. We do not fault BLM for regulating only commercial use in 1980, as it has data on such use from 1979, and, obviously, as it must start somewhere in its effort to regulate use effectively. BLM may be able to use the data assembled in 1980 regarding private use to remove inequities between private and commercial leases, if any, by regulating the former. However, we will not invalidate BLM's interim effort to govern commercial use of the Rio Grande because it has been unable to develop a plan to govern all such use.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Edward W. Stuebing
Administrative Judge

We concur:

Frederick Fishman
Administrative Judge

James L. Burski
Administrative Judge

